Supreme Court, U.S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-963

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAWRENCE V. ROBERTSON, JR.
Vice President, General Counsel and Secretary
Interstate Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

December 21, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
STATEMENT OF INGAA'S INTEREST	2
ARGUMENT	3
I. Resolution Of The Question Will Have An Important Impact On The Development Of Domestic Energy Resources	3
II. The Court Of Appeals' Assumption That The Pipeline Industry Finds The Commission's 60 Percent Condition Tolerable Is Erroneous	4
CONCLUSION	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-963

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, the Interstate Natural Gas Association of America (INGAA) hereby files its brief, as *Amicus Curiae,* in support of Petitioner Transcontinental Gas Pipe Line Corporation's (Transco) Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Transcontinental Gas Pipe Line Corporation* v. *F.E.R.C.,* 589 F.2d 186 (5th Cir. 1979).

INGAA has received the parties' consent to file the instant brief and has filed with the Clerk of the Court letters so indicating.

STATEMENT OF INGAA'S INTEREST

INGAA is a nonprofit, national trade association representing virtually all of the major natural gas transmission companies operating in interstate commerce in the United States. Insofar as pertinent hereto, INGAA's member companies, which account for approximately ninety percent of all natural gas transported and sold in interstate commerce, are subject to the jurisdiction of the Federal Energy Regulatory Commission (Commission) under the Natural Gas Act.

Approximately fifteen of INGAA's member companies currently purchase natural gas produced in the offshore Louisiana area; and, from time to time, each is required to construct offshore pipeline facilities, either individually or jointly with other pipelines, in order to attach new offshore reserves. Hence, each such member company is potentially subject to the imposition of a 60% load factor condition such as was imposed by the Commission upon Transco's certificate of public convenience and necessity at issue herein. As a consequence, INGAA's members have a substantial interest in the Court's disposition of Transco's Petition for Writ of Certiorari.

Because of the importance of the question to its member pipelines, INGAA participated as *amicus curiae* in support of Transco's petition for rehearing in the court of appeals.

INGAA has reviewed Transco's petition for writ of certiorari and concurs in the arguments set forth therein. In this brief, INGAA wishes to emphasize certain points of special concern to the industry as a whole.

ARGUMENT

I. Resolution Of The Question Will Have An Important Impact On The Development Of Domestic Energy Resources

The specific issue decided by the court of appeals in this case is "whether this [60%] condition attached to this certificate is 'reasonable' and required by the 'public convenience and necessity.' " 589 F.2d at 190. Restated in the broader terms of its impact on INGAA's member pipelines, however, the question is whether the Commission can use its power to condition certificates as a vehicle to deny pipelines the opportunity to recover from their customers their costs prudently incurred pursuant to Commission certificates. INGAA believes that this question is of such importance to the gas pipeline industry and the future course of domestic energy development that this Court should grant the writ.

There can be little doubt that the decision of the court of appeals, if allowed to stand, raises the specter of serious adverse financial consequences for interstate pipeline companies. However, of even greater importance to the nation is the counterproductive impact which such a decision will have on the future course of domestic energy development. No prudent management can be expected to commit its funds to projects for which a loss of the investment has been virtually guaranteed. By the same token, no financial institution can be expected to provide the necessary financing for a project which poses such a serious risk to the borrower's ability to service and repay the debt capital. The adverse consequences to the nation's efforts to increase its reliance on domestic energy resources are obvious. Clearly, this is no time to impose, through

regulatory agency fiat, unreasonable restraints on timely development of domestic energy resources.

II. The Court Of Appeals' Assumption That The Pipeline Industry Finds The Commission's 60 Percent Condition Tolerable Is Erroneous

In its decision, the court of appeals ascribed some significance to the fact that there have been no other litigated cases involving Section 2.65(b) of the Commission's Statements of General Policy and Interpretations during the ten years since such policy was announced. 589 F.2d at 191, n. 6. On the basis of this observation, the court concluded that "[s]omehow the industry has been able to live with this regulation for the last ten years." *Id.* As the interstate gas transmission industry's trade association, INGAA believes that it is in a unique position to dispel any notion that the implementation of the Commission's 60% rule, under its latter-day interpretation as an ongoing capacity utilization requirement, is the least bit acceptable to or reasonable in the eyes of INGAA's membership.

For the first seven years of the policy's existence, from 1968 until 1975 when the *Trunkline* order [1] was issued, the natural gas pipeline industry had no reason to believe that the Commission's 60% load factor policy was anything but a one-time test of offshore facility utilization. Moreover, the 60% condition was applied to relatively few of the many offshore facilities certificated by the Commission during that period of time. Further, those few pipelines upon which the condition was imposed were confident that they would be able to satisfy the requirement of such a one-time capacity utilization test; and, the industry's experience with off-

[1] *Trunkline Gas Co.*, Docket No. CP75-273, 54 FPC 1087 (1975).

shore facilities has proven that such confidence was justified. Thus, it is readily understandable why the Commission's 60% utilization policy was not viewed generally in the industry as a significant or intolerable burden.[2]

By way of contrast, the pipeline industry considers the Commission's post-1975 interpretation of the 60% condition as an ongoing requirement to be an extremely serious matter. If the 60% condition is upheld and if the Commission imposes the condition in offshore construction certificates issued in the future, such action would result in significant adverse financial consequences for the individual member companies of INGAA. Moreover, as indicated above, the magnitude of the adverse financial consequences which result from an interpretation of the 60% condition as an ongoing requirement would be exacerbated by the recent trend which reflects that the newer offshore fields are being produced and depleted in shorter periods of time, thus hastening the time by which offshore pipeline facility utilization will fall below the 60% level. Pipelines are virtually powerless to control or to remedy this situation.

Also of great concern to INGAA's members is the fact that the decision below contravenes well-settled principles of public utility ratemaking which assure pipelines of the opportunity to recover their prudent costs.[3] Under Sections 4 and 5 of the Natural Gas Act, pipelines are entitled to the opportunity to recover

[2] We do not mean to suggest, however, that there was any agreement in the industry with the proposition that a one-time test constituted a lawful exercise of the Commission's authority.

[3] See, Transco's petition for writ of certiorari, pp. 14-15.

their prudent costs; the Commission cannot subvert such opportunity under the guise of a Section 7 certificate condition. INGAA respectfully submits that the 60% rate condition, particularly under the Commission's recent interpretation of the condition as an ongoing requirement, is unreasonable, illogical and unlawful.

INGAA respectfully submits that there is no rational justification for the imposition of financial penalties on pipelines simply because they have constructed the facilities necessary to attach new offshore gas fields, which facilities the Commission has determined to be "required by the public convenience and necessity." Such financial penalties deprive pipelines of the opportunity to recover their prudent expenditures and are, therefore, clearly unlawful under the Constitution and the Natural Gas Act.

CONCLUSION

INGAA respectfully submits that this Court should grant the writ of certiorari.

Respectfully submitted,

LAWRENCE V. ROBERTSON, JR.
Vice President, General Counsel and Secretary
Interstate Natural Gas Association of America
1660 L Street, N.W.
Washington, D.C. 20036

December 21, 1979